FLIGHT SAFETY FOUNDATION

Safety Information in Jeopardy

Remarks by

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For the past day and half we have been hearing a lot about the current status of the GAIN concept. We have heard about the tools for collection of data, experiences of sharing data, some of the problems and the benefits.

During the last two sessions we are going to discuss, firstly with a panel and then together with the audience, ideas on where we go from here to determine the future direction of GAIN.

However, before we do that I want to focus on what is likely to be the greatest obstacle facing the collection of safety data and dissemination of safety information. And that is the growing tendency we see in the US and other parts of the world at attempts to use information collected as part of an accident investigation to support the prosecution of those involved.

Traditionally (and certainly in the US) the accident investigators were the first on the scene of an accident. They interviewed witnesses, survivors and other participants. They sifted through the wreckage and gathered physical evidence for testing. They retrieved and

analyzed the flight data recorder and cockpit voice recorder. They determined the cause of the accident and recommended fixes to the aircraft or the system that would prevent a repeat of the same event. In this way the aviation accident rate has been progressively improved to the low level that we see today.

Of course, victims and their families knew that the NTSB staff could be deposed, and that lawyers could attend agency hearings and gather data for their cases. But investigation by state and local authorities usually came after the board had done its detective work. If the NTSB found evidence of any criminal activity, they would bring in the appropriate authority.

Now, however, things appear to be changing. Increasingly following an accident in the USA, there are investigations being carried out by state or federal authorities such as the FBI, the FAA, the DOT's office of Inspector General, or the EPA Criminal Enforcement division in parallel with those of the accident investigation team. Worse, physical evidence that might help establish an accident's cause is being impounded. Further, other evidence held by the NTSB is being subpoenaed and the agency is bombarded with sweeping requests under The Freedom of Information Act for every record that they have relating to particular accidents or events.

But this situation is not confined only to demands on the accident investigators.

The low accident rate we enjoy today is largely the result over the years of the work and excellent investigation procedures that have followed an accident. However, while such investigations must continue, this reactive approach is no longer producing significant reductions in the accident rate. In the developed world the rate continues to trend slowly downwards, but it is not going down as fast as traffic is growing. As a result, we can expect to see the actual number of accidents increasing unless the rate is reduced.

In the future, rather than being reactive, we have realized the need to be proactive by identifying potential problems that can be corrected before they become serious. With this has come the recognition that, since human factors are involved in 85 percent or more of all accidents, there is a need to monitor the actions of those involved.

And from this have come FOQA programs involving the continuous analysis of the flight data recorder together with pilot error reporting programs.

Of course, such programs are seen by many as being intrusive and implementation has required careful negotiation with assurances that they will only be used to help improve safety and that they are totally confidential and non-punitive. The British Airways BASIS system and American Airlines ASAP scheme are prime examples that have proved their worth repeatedly in preventing incidents, and even accidents, before they have happened, as well as effecting significant ost savings. Indeed, confidential non-punitive monitoring programs are our best hope for maintaining the present low accident rate and of making significant reductions in the future.

However, these programs are also now under threat, both by government agencies and by plaintiff's lawyers in civil cases in the USA who have demanded access to FOQA and ASAP type data under the legal process of discovery.

The upshot of the investigations of accidents by state and federal authorities is that people are 'clamming-up'. Companies and individuals that might be involved are retaining lawyers before talking to the accident investigation agency, for fear that anything they say might be used by others to incriminate them. And this, needless to say, has impeded accident investigations and the finding of an accident's causes.

For example, although it was not an aviation accident, the NTSB has still not interviewed key witnesses in the pipeline explosion in Washington State a year ago because, on the advice of their lawyers, they have invoked their Fifth Amendment rights. Similarly the NTSB has still not been able to test a critical valve, suspected as being one of the causes of the explosion, because the US attorney is holding it as possible evidence in a criminal case.

And this 'clamming-up' is not confined to the USA. In recent years, in New Zealand a prolonged battle has been going on over the right of the police to use CVR data, gathered in confidence, as possible evidence in a prosecution of the pilots involved in a fatal commercial accident. While the New Zealand Parliament may now have declared

that such information should be protected and not used for prosecution purposes, in the meantime pilots have been advised by their Union to consider CVRs to be 'not privileged'. They have been instructed to avoid "like the plague" confidential and anonymous reporting systems and not to cooperate voluntarily without legal advice "in any way whatsoever" with any state authority in respect to the investigation of accidents or incidents.

Similarly, the demands for access to FOQA and ASAP information places these types of programs in jeopardy. These programs rely upon confidentiality and assurances from both employers and regulators that evidence of any inadvertent errors detected will be used to help enhance safety and not in a punitive manner. It does not take much imagination to realize that if people think they might be penalized for errors that are detected they will be reluctant to reveal them freely if they can get away with it.

In the civil lawsuit following the Cali accident, the plaintiff's attorneys asked to be given all of American Airlines' prior ASAP data to see how it might be used to support their case. Fortunately, in this instance, and following representations from numerous quarters including the Flight Safety Foundation, the judge denied the request. Nevertheless, another judge in another court, on another day might not have made the same decision.

It goes without saying, that the day that any pilot or other employee is prosecuted on the basis of evidence voluntarily supplied in confidence in support of safety improvement efforts, is the day that all such programs stop. Very few will be willing to continue to provide such evidence if there is a risk that it will be used against them.

Incredible though it seems to me, statements have been made by prosecutors to the effect that they believe punishment is more important than the pursuit of safety. With this attitude, it follows that plaintiff's lawyers, in any lawsuit following an accident also feel that access to confidential operating information, is their right.

From my point of view these actions prove nothing except that aviation is increasingly the target of legal actions in a way that can only be harmful to achieving further safety improvements. Of course,

if a company knowingly obstructs justice by destroying or withholding key documents, that is patently criminal and must be condemned. However, going after individuals and companies as a result of truthful statements made to accident investigators, or for past FOQA data supplied in confidence, is highly detrimental to the fundamental safety of the traveling public.

If we are to improve aviation safety significantly in the future we need to have those who fly, maintain, design and regulate airplanes to share information candidly, even if it is damaging.

When we worry after a crash more about finding someone to blame who can be punished, than finding out what went wrong and why, we invite reoccurrence of the tragedy with possibly more lives lost.

Decriminalization of the aviation laws and legal protection of confidential data supplied in support of safety improvement programs are steps that must be taken to ensure the continuing improvement of aviation safety.